

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in September 2016

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

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COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

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| <u>KEYWORDS:</u> | Motion to Dismiss; Suspension with Pay; Relief; Advisory Opinion; Moot; Wholly Unavailable |
| <u>CASE STYLE:</u> | <u>Marcum v. Mingo County Board of Education</u> DOCKET NO. 2016-0949-MinED (9/30/2016) |
| <u>PRIMARY ISSUES:</u> | Whether Respondent's decision not to renew Grievant's employment contract rendered this grievance moot, and whether the relief sought is wholly unavailable. |
| <u>SUMMARY:</u> | <p>Grievant was employed by Respondent as LPN Instructor/Coordinator. Grievant was suspended with pay pending investigation of an incident involving student clinical performance. Grievant grieved her suspension, raising concerns about the investigation, and seeking reinstatement to her position. While the grievance was pending, Respondent made the decision not to renew Grievant's contract for the upcoming school year. Grievant did not file a grievance regarding the same. Grievant is no longer employed by Respondent. The Respondent deemed the investigation concluded at the expiration of Grievant's employment contract. Respondent moved to dismiss the grievance alleging lack of standing, mootness, and that the relief sought was wholly unavailable. Respondent proved by a preponderance of the evidence that the grievance should be dismissed as the issues raised are now moot, and any ruling thereon would result in an advisory opinion. Further, the relief sought is now wholly unavailable. Therefore, the grievance is DISMISSED.</p> |

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COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

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| <u>KEYWORDS:</u> | Extra-Duty Assignment; Long-Term Substitute; Next in Line; Compensation; Back Pay |
| <u>CASE STYLE:</u> | <u>Rose v. Nicholas County Board of Education</u> DOCKET NO. 2016-0835-NicED (9/22/2016) |
| <u>PRIMARY ISSUES:</u> | Whether Grievant proved that he was 'next in line' for the extra-duty assignment. |
| <u>SUMMARY:</u> | Grievant contends he was unlawfully deprived of an extra-duty assignment and seeks to recoup the lost compensation. Respondent erroneously assigned an extra-duty assignment to a substitute bus operator rather than a regular bus operator on the extra-duty assignment rotation list. Respondent's actions were done without ill-will, but nevertheless were not proper. Grievant persuasively clarified and demonstrate lost economic opportunity. This grievance is GRANTED. |
| <u>KEYWORDS:</u> | Extracurricular Assignment; Regular Run; Shuttle Run; Compensation |
| <u>CASE STYLE:</u> | <u>Loy v. Wetzel County Board of Education</u> DOCKET NO. 2016-1602-WetED (9/30/2016) |
| <u>PRIMARY ISSUES:</u> | Whether Grievant met her burden of proof in demonstrating that Respondent violated the applicable law and failed to post the extracurricular assignment. |
| <u>SUMMARY:</u> | Grievant is employed by Respondent as a bus operator. Grievant established by a preponderance of the evidence that she was performing an extracurricular bus run for which she should be compensated. In addition, Grievant established by a preponderance of the evidence that the "shuttle run" should be removed from her regular run and posted pursuant to applicable law. |

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STATE EMPLOYEES

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| <u>KEYWORDS:</u> | Termination; Under the Influence of Alcohol or Drugs; Drug Testing; Reasonable Suspicion; Hearsay Evidence; Policy |
| <u>CASE STYLE:</u> | <u>Barnes v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital</u> DOCKET NO. 2016-1594-CONS (9/19/2016) |
| <u>PRIMARY ISSUES:</u> | Whether Respondent had good cause to terminate Grievant. |
| <u>SUMMARY:</u> | Grievant, a supervisor, was dismissed from his employment as a Therapeutic Program Director by Respondent for testing positive for marijuana in his system while at work. Respondent presented sufficient credible evidence to establish that there was reasonable suspicion to warrant ordering Grievant to submit to a “for cause” drug test. However, Respondent failed to demonstrate by a preponderance of the evidence that Grievant actually had a prohibited substance in his system, as alleged, relying on unreliable and patently inadequate hearsay evidence. Accordingly, Respondent failed to demonstrate good cause for Grievant’s dismissal. |

KEYWORDS:

Non-Discriminatory Workplace Harassment; Work Location; State Vehicle; Retaliation; Reprisal; Hostile Work Environment

CASE STYLE:

Williamson v. Division of Highways

DOCKET NO. 2016-0608-CONS (9/22/2016)

PRIMARY ISSUES:

Whether Grievant established by a preponderance of the evidence that he was a victim of a hostile work environment.

SUMMARY:

This is a consolidated grievance wherein Grievant contends he has been the target of harassment, a hostile work environment and retaliation by Respondent. Grievant seeks certain identified employment conditions. Grievant identified a protected action, which he believes motivated a negative consequence to his employment. Previously, Grievant received work environment options more readily than other workers. Aspects of desired options ceased. Grievant wants certain identified working conditions restored.

Grievant is not empowered with the ability to demand preferred conditions of employment beyond that of a similarly situated employees. Grievant is now being treated within the parameters of existing agency rules and regulations. Certain preferred working conditions and identified options Grievant enjoyed are recognized in the facts of this matter. What motivated Respondent to cease providing Grievant preferential options is not established with true certainty, but the condition(s) of Grievant's employment with Respondent is not in violation of existing agency rules and regulations. Grievant failed to persuasively establish by a preponderance of the evidence that Respondent's actions toward him, e.g., reassignment in and of itself was nefarious conduct. Grievant alleged harassment and hostile work environment. Grievant did not meet the burden in accordance with the grievance statute or Workplace Harassment Policy. Grievant did not demonstrate that Respondent's current personnel actions with respect to him are illegal. Grievant has not established a violation of an applicable and controlling statute, rule or policy. Accordingly, this grievance is DENIED.

KEYWORDS:

Selection Process; Interview Committee; Job Classification; Supervisory Position; Most Qualified Candidate; Arbitrary and Capricious; Abuse of Discretion

CASE STYLE:

Weimer v. Public Service Commission and Robert Weiford II, Intervenor

DOCKET NO. 2015-1646-PSC (9/29/2016)

PRIMARY ISSUES:

Whether Grievant demonstrated that he was the most qualified applicant for the position, or that there was a significant flaw in the selection process.

SUMMARY:

Grievant is desirous of the classified position of Engineer Senior. Grievant alleges that Respondent's selection process was severely flawed and the selected applicant, Intervenor, is or was unqualified. An interview panel met with candidates, after the interviews the members recommended the Intervenor for the position based upon his qualifications, desired skill set(s) and his interview performance. Grievant failed to persuasively demonstrate that he was the most suited applicant for the position. Grievant failed to demonstrate that his non-selection was the product of unlawful, unreasonable, or arbitrary and capricious behavior. Grievant failed to demonstrate that he was the overall best candidate for the position. The successful candidate was deemed qualified and Respondent presented a rational basis for the determination it reached for the selection of Intervenor as the successful applicant. This grievance is DENIED.

KEYWORDS: Pay; Job Classification; Policy; Transportation Worker Apprenticeship Program; Arbitrary and Capricious

CASE STYLE: Dragoo v. Division of Highways and Division of Personnel
DOCKET NO. 2016-0833-DOT (9/29/2016)

PRIMARY ISSUES: Whether Respondent acted in an arbitrary and capricious manner in its implementation of the Transportation Worker Apprenticeship Program.

SUMMARY: Grievant asserts the position he occupies should be paid at a higher rate of pay than the welder positions he supervises. Grievant is a Transportation Worker 3-Crew Chief. Grievant is paid in accordance with the State Personnel Board's approved tier structure within the Division of Highways Apprenticeship Program. Grievant did not establish by a preponderance of the evidence that his pay should be higher than the welders on his crew whose positions have been placed in the TW 4 classification. There is no identified rule or law applicable to Respondent's employees providing that a supervisor must have a higher rate of pay than the employees he or she may supervise. Further, Grievant failed to establish by a preponderance of the evidence that either Respondent DOH or DOP acted in an arbitrary and capricious manner or in violation of any statute, policy, or rule in the implementation of the Transportation Worker Apprenticeship Program. This Grievance is DENIED.

KEYWORDS: Pay; Overpayment; Repayment; Salary Adjustment; Discrimination; Reprisal; Arbitrary and Capricious; Retaliation

CASE STYLE: Morgan v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital

DOCKET NO. 2015-1327-DHHR (9/27/2016)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that Respondent's actions in seeking repayment from him for an overpayment in his wages were retaliatory, discriminatory, and arbitrary and capricious.

SUMMARY: Grievant is employed by Respondent as a housekeeper at Mildred Mitchell-Bateman Hospital. In May 2015, it was discovered that Grievant was being paid in excess of his correct salary, and Respondent adjusted his salary downward to correct the error. However, it was later learned that Grievant had been both overpaid and underpaid at varying times between February 2012 and May 2015 due to clerical errors resulting in his being over paid a total of \$2,013.58 during that time. Initially, Grievant sought a return to the higher salary. However, Grievant acknowledged that a mistake had been made and withdrew his claim to the higher salary. During the level one proceeding, Respondent informed Grievant that it intended to seek repayment of the overpayment from him. Grievant continued with his grievance alleging discrimination, reprisal, and that Respondent's actions were arbitrary and capricious. Respondent denied all of Grievant's claims. Grievant failed to prove his claim of discrimination by preponderance of the evidence. Grievant established a prima facie case of reprisal, and Respondent successfully rebutted the presumption of retaliation. Grievant proved that Respondent's actions in seeking repayment of the overpayment was unreasonable, and otherwise arbitrary and capricious. Therefore, this grievance is GRANTED IN PART, and DENIED IN PART.

KEYWORDS: Shift Differential Pay; Additional Period of Back Pay; General Bad Faith

CASE STYLE: Robertson v. Department of Health and Human Resources/Jackie Withrow Hospital
DOCKET NO. 2015-1645-DHHR (9/20/2016)

PRIMARY ISSUES: Whether Grievant proved she was entitled to an additional period of back pay.

SUMMARY: Grievant is employed by Respondent at Jackie Withrow Hospital in the dietary department. Other employees of the dietary department filed a grievance and were awarded back shift differential pay. Grievant was not a party to that grievance and was only paid shift differential pay from the entry of the grievance decision forward. Grievant filed the instant grievance and, at level one, was awarded back shift differential pay for a period of one year prior to the filing of her grievance. Grievant asserts she is entitled to an additional period of back pay because Respondent acted in bad faith in refusing to pay Grievant back pay. An additional period of back pay is available only if Respondent commits the specific act of bad faith of “concealing the facts giving rise to the claim for back pay.” Grievant failed to prove she was entitled to an additional period of back pay as Grievant offered no evidence or argument that Respondent in any way concealed facts from Grievant. Accordingly, the grievance is denied.

KEYWORDS: Reprisal; Retaliation; Job Duties; Schedule; Arbitrary and Capricious

CASE STYLE: Richmond v. Division of Motor Vehicles
DOCKET NO. 2015-1267-DOT (9/29/2016)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that Respondent’s actions in changing her work duties and schedule were in retaliation for filing a prior grievance, or arbitrary and capricious.

SUMMARY: Grievant is employed by Respondent as a customer service representative. Respondent changed Grievant’s work schedule, and made other changes to the checkout and inventory procedures at her office. Grievant alleges reprisal, and that Respondent’s actions in making the changes were arbitrary and capricious. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, this grievance is DENIED

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| <u>KEYWORDS:</u> | Back Pay; Overtime; Shift Differential Pay; Work Hours |
| <u>CASE STYLE:</u> | <u>Large v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital</u> DOCKET NO. 2014-1634-DHHR (9/28/2016) |
| <u>PRIMARY ISSUES:</u> | Whether Grievant proved that he is entitled to \$889.24 for the pay period during which he was suspended for overtime back pay and shift differential pay. |
| <u>SUMMARY:</u> | Grievant is employed at Sharpe Hospital as a Health Service Worker. Grievant was suspended, without pay, pending the completion of an Adult Protective Services' investigation. Grievant was reinstated following the investigation and reimbursed straight time back pay for the period of the suspension. Respondent concedes that Grievant was scheduled for overtime during the investigation and that he is owed additional back pay for that period of time. Grievant proved by a preponderance of the evidence that he is entitled to \$889.24 for the pay period during which he was suspended for overtime back pay and shift differential pay. |
| <u>KEYWORDS:</u> | Reimbursement for Membership Charges; Physical Training Facilities and Equipment Policy |
| <u>CASE STYLE:</u> | <u>Yahnke, et al. v. Division of Corrections/Northern Correctional Center</u> DOCKET NO. 2016-1033-CONS (9/20/2016) |
| <u>PRIMARY ISSUES:</u> | Whether Grievants are entitled to be reimbursed for membership charges to local fitness centers they used during the time that Respondent's Policy Directive 205.00 was in effect. |
| <u>SUMMARY:</u> | Grievants are employed by the West Virginia Division of Corrections at the Northern Correctional Facility. Respondent's policy in effect at the time provided that employees would have access to exercise and physical training facilities and equipment. Northern Correctional Center previously had an agreement with a local gym which employees could use at Respondent's expense. The agreement expired and a new agreement was not reached. Grievants joined a local gym to have access to fitness equipment and seek reimbursement from Respondent. Grievants established by a preponderance of the evidence that Respondent was not following applicable policy. This grievance is granted. |

KEYWORDS: Termination; Excessive Force; Defensive Tactics; Empty-Hand Control; Code Of Conduct; Hearsay Evidence

CASE STYLE: Lunsford, et al. v. Regional Jail and Correctional Facility Authority/Western Regional Jail
DOCKET NO. 2016-1368-CONS (9/28/2016)

PRIMARY ISSUES: Whether Respondent proved the charges against Grievants by a preponderance of the evidence.

SUMMARY: Both Grievants were involved in an incident which occurred while restraining a prisoner at the Jail. CO Kelly was dismissed for allegedly pushing a restraint chair under the prisoner forcing him to fall into the chair even though the prisoner was compliant. CO Lunsford was dismissed for allegedly punching the prisoner with a closed fist in retaliation for being bitten by the prisoner. A video of the incident show the prisoner being seated in the chair and being struck twice by CO Lunsford. There was insufficient evidence presented to prove that the prisoner was forced to fall into the chair by CO Kelly. Additionally, CO Lunsford, who is a trainer of defense tactics for the RJCFA provided undisputed testimony that the strikes he delivered to the prisoner were appropriate defensive measures under the circumstances and his actions did not violate the agency's rules and procedures.

KEYWORDS: Termination; Probationary Employee; Unsatisfactory Job Performance; Probationary Contract

CASE STYLE: Hays v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2015-0591-DHHR (9/7/2016)

PRIMARY ISSUES: Whether Grievant proved that her job performance was satisfactory.

SUMMARY: Respondent terminated Grievant's probationary employment after a number of incidents cause it to believe that her job performance was unsatisfactory. These incidents indicated that she was not cooperative with other members of the Multidisciplinary Treatment Teams which operate to provide a group based approach to care for vulnerable children.
Grievant contended that her performance was satisfactory if not meritorious. She believed that the problems with the other team members were the result of misunderstanding or unreasonable vendettas against her for her zealous pursuit of assistance for this at risk population.
Grievant did not prove that her performance was satisfactory.

KEYWORDS: Demotion; Use of Force; Application of Restraints; Code of Conduct; Policy and Procedure

CASE STYLE: Breeden, Jr. v. Regional Jail and Correctional Facility Authority/South Central Regional Jail
DOCKET NO. 2016-0834-MAPS (9/8/2016)

PRIMARY ISSUES: Whether Respondent proved by preponderance of the evidence that it justifiably demoted Grievant based upon his actions.

SUMMARY: Grievant was demoted from his position as a Correctional Officer III ("CO III") or Corporal to Correctional Officer II ("CO II") at the South Central Regional Jail ("Jail" or "facility"). Respondent alleges he failed to direct the proper use of restraints on inmates of the facility, as permitted under its policies and procedures, even though the inmates had recently exhibited violent behavior, which failure led to further violence - specifically an altercation between correctional officers and the inmates. Grievant responds that, based upon a lapse in time between the first attack and the movement of the inmates, as well as the non-threatening demeanor of the inmates directly before they were moved, he reasonably believed the inmates no longer presented a danger when moved. Moreover, Grievant contends that he believed using restraints on the inmates when they were not openly hostile or threatening may have constituted unnecessary and unlawful use of force, under the Respondent's policies. Grievant had a prior disciplinary record. The limited record proved Grievant's failure to authorize restraint of the inmates shortly after the sudden violent attack on the officers constituted poor judgment, and resulted in a further attack. It was foreseeable that sudden volatility could have erupted under the circumstances. As such, Respondent justifiably demoted Grievant.

KEYWORDS: Salary; Continuing Practice; Timeliness; Employer Representations; Excuse; Continuing Damage; Employer Cause of Delay; Estoppel; Effort to Resolve Grievance

CASE STYLE: Wise v. Division of Highways

DOCKET NO. 2015-1263-DOT (9/15/2016)

PRIMARY ISSUES: Whether this grievance was timely filed.

SUMMARY: Grievant became aware shortly after he began his employment that his starting salary was not what he had expected. Grievant first filed a grievance challenging his starting salary over a year after he became aware of this issue. While Grievant's delay in filing until the end of his probationary period can be excused, based on his supervisor's representations, Grievant offered no excuse for the additional delay of nine months after the end of his probationary period. The grievance was not timely filed.

KEYWORDS: Termination; Motion to Dismiss; Abuse of a Patient; Office of Health Facility Licensure and Certification; Nurse Aide Abuse and Neglect Registry of the State of West Virginia; Relief; Remedy Wholly Unavailable

CASE STYLE: Lamm v. Department of Health and Human Resources/Lakin Hospital

DOCKET NO. 2016-1613-DHHR (9/12/2016)

PRIMARY ISSUES: Whether the remedy of reinstatement is available to Grievant.

SUMMARY: Respondent dismissed Grievant based upon an allegation of abuse of a patient at Lakin Hospital. Respondent is required to report such allegations to the Office of Health Facility Licensure and Certification ("OHFLAC"). OHFLAC conducts an independent investigation and if it substantiates patient abuse it places the offender on a registry which prohibits hospitals from hiring them. Grievant was placed upon the OHFLAC register of abuse and Respondent is prohibited by federal law from hiring him regardless of the outcome of this grievance.

KEYWORDS: Termination; Altered Physician's Statement; Misconduct; Holiday Pay

CASE STYLE: Gaines v. Department of Health and Human Resources/Bureau for Children and Families

DOCKET NO. 2016-1525-CONS (9/13/2016)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant.

SUMMARY: Grievant was employed by Respondent as a Family Support Specialist. This Bureau for Children and Families position determines whether clients for public aid are eligible for cash assistance, food stamps, Medicaid and other state and federal programs. The record demonstrated that Grievant is not entitled to holiday wages. Respondent demonstrated by a preponderance of the evidence that dismissal was proper because Grievant submitted an altered physician's statement.